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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1288

ALFRED DUNHILL OF LONDON, INC.,

Petitioner,

v.

THE REPUBLIC OF CUBA and
DANIEL SOLANO PINERA, as Interventor,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF BANK OF BOSTON INTERNATIONAL AS *AMICUS CURIAE*

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By consent of the petitioner and the respondents indorsed hereon in accordance with Rule 42(2) of this Court, the Bank of Boston International files this brief as *amicus curiae*, urging reversal of the judgment below.

Interest of the *Amicus Curiae*

The *amicus curiae*, Bank of Boston International (hereafter "BBI"), has an interest in this case in that it is the plaintiff in *Bank of Boston International* v. *Banco Nacional de Cuba*, 61 Civ. 2116, an action pending before the United States District Court for the Southern District

of New York, in which is involved, *inter alia*, a substantially similar question to that presented for decision in the instant case, that is, whether statements by counsel* that an obligation will not be honored constitute an act of state. The question is presented in even more extreme terms than in *Dunhill*, since in the *Bank of Boston* case the statements of counsel which were made are in direct conflict with the legislation and administrative resolutions of the Republic of Cuba which expressly assumed the contractual obligation upon which the claim of BBI is based.

Bank of Boston International v. *Banco Nacional de Cuba*

BBI commenced its action in the Supreme Court of the State of New York, County of New York, in April 1961. Defendant, Banco Nacional de Cuba, removed the action to the United States District Court for the Southern District of New York. Jurisdiction over the defendant was acquired by levy pursuant to an order of attachment upon all its property located in New York County. The attachment has remained in effect at all times since April 1961. A trial was held in the Southern District of New York before the Honorable Frederick V. P. Bryan from June 12 to June 14, 1972 and on July 17, 1972. The case is still *sub judice*, presumably, awaiting a final determination of the instant petition.

The claim for relief asserted by BBI arose out of a loss to BBI's assignor, The First National Bank of Boston (the "Boston Bank"), resulting from commercial transactions

* The same counsel that made the statement in *Dunhill*.

in the form of 324 letters of credit issued by the several Cuban branches of the Boston Bank (collectively the "Cuban Branch"), prior to their expropriation by the Cuban government, for the account of Cuban importers and in favor of exporters to Cuba located primarily in the United States. The letters of credit provided that drafts drawn under them were payable to such exporters at the office of the Boston Bank in Boston, or at the office of BBI in New York. Upon expropriation, Banco Nacional de Cuba assumed control of the Cuban Branch. Thereafter, pursuant to such letters of credit, the Boston Bank paid out $1,675,748.71 to finance (also after the expropriation) the importation of essential merchandise into Cuba.

It is BBI's contention that under cases such as *Pan-American Bank and Trust Co.* v. *National City Bank of New York*, 6 F.2d 762 (2d Cir.), *cert. denied*, 269 U.S. 554 (1925), the Cuban Branch owed a legally recognizable obligation to reimburse its head office for payments made under these letters of credit and that this obligation was assumed by Banco Nacional under the expropriation decrees which transferred to Banco Nacional all liabilities, as well as $8,000,000 in assets, of the Cuban Branch. In addition, BBI seeks to recover the amount paid upon these letters of credit upon a contractual obligation expressly undertaken by Banco Nacional prior to expropriation of the Cuban Branch of the Boston Bank (and relied upon by the Boston Bank) to make dollars available to the Boston Bank in an amount equal to payments made under the 324 letters of credit.

BBI's claim did not challenge or disregard any act of the Republic of Cuba. Rather it brought an action that sought

to affirm acts of the Cuban state.* In its first claim, BBI relied on Law No. 930 of the Republic of Cuba which provided that Banco Nacional, as the legal successor to the Cuban Branch, had assumed all the obligations of the Cuban Branch peculiar to its banking operations. Cuban Law No. 930, Special Provision Fifth (1961). In its second claim BBI showed that prior to nationalization (a) Banco Nacional approved every one of the letter of credit transactions; (b) the head of the exchange control department of Banco Nacional expressly represented to officers of the Cuban Branch that such approvals were a commitment to reimburse the Boston Bank for payments made under letters of credit; and (c) payment of dollars by Banco Nacional was required pursuant to the relevant Cuban foreign exchange statutes (Cuban Law No. 13 Article 81 (1948); Cuban Law No. 891 (1960)).

In response to BBI's showing of various statutes, regulations, judicial decisions and other governmental acts of the Republic of Cuba, defendant Banco Nacional offered no evidence of any contrary "act" of the Cuban state other than the passive failure to reimburse the Boston Bank and the assertions of defendant's attorneys made for the first time on the eve of trial eleven years after the case was brought. Defendant conceded that its assertion that the mere failure to pay constitutes an act of state was the same argument it raised in the *Dunhill* case.

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* The expropriation decrees were the same decrees involved in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972).

ARGUMENT

I.

Statements by Trial Counsel Cannot Constitute an Act of State.

An attorney's statement in court that an act of state exists does no more than *raise* the issue, as a pleading or argument. It cannot serve as *proof* that an act of state has taken place. If this Court rules that in court statements by an attorney can constitute an act of state, no United States court could ever render a judgment in a contract action against a foreign sovereign since an attorney could simply immunize his client from liability by coming into court and asserting that his client will not pay, regardless of the reason. Indeed, under the reasoning of the Court of Appeals in the instant case, the filing of an answer denying liability would totally insulate any such defendant from any liability whatsoever.

The lengths to which this dangerous precedent will be carried, if allowed to stand, is graphically demonstrated by *Bank of Boston International* v. *Banco Nacional de Cuba*. In that case, plaintiff's claim as to the liability of Banco Nacional de Cuba is *predicated* on official statutes and resolutions of the Cuban government which have never been repealed and are still in full force and effect. To consider the eleventh-year assertions of counsel as an act of state is dubious under any circumstances, but to allow such statements to overrule and countermand official acts of state is absurd. Yet that is precisely the contention being made by Banco Nacional on the strength of the Court of Appeals' decision in *Dunhill*.

II.

If the Decision Below Is Allowed to Stand the Repudiation of Contractual Obligations Will Be Rewarded and International Trade Will Be Seriously Curtailed.

It is common knowledge that the recent years have witnessed a marked increase in international trade and commerce; and that as foreign governments have become increasingly involved in commercial activities this foreign commerce has increasingly consisted of transactions by United States businesses or the United States Government with foreign governments acting in a commercial capacity. INTERNATIONAL ECONOMIC REPORT OF THE PRESIDENT, p. 37 (1974). This trade is of great importance to the United States economy. If it is to continue to prosper, it is essential that there be assurance that contractual obligations voluntarily undertaken by foreign governments and quasi-governmental bodies such as Banco Nacional will not lightly be nullified. While banks and others realize that there is such a doctrine as the Act of State, and that there are certain situations in which contracts can be abrogated by governmental acts, the risk from such acts should be clearly limited to those situations in which the governmental act is clearly evident. Rather than acquiesce in wholesale affronts to international law, this Court should establish a clear burden of proof for any foreign governmental agency claiming a windfall excuse from liability. Any holding of this Court which will allow a foreign government to escape responsibility for its commercial contractual obligations merely by having an attorney come into court and say that the government has decided not to pay would create the

potential of foreign governments and quasi-governmental bodies repudiating any time they choose contractual obligations solemnly assumed. Obviously, in addition to conferring on these foreign entities this potential of self-executing windfalls, any such holding would constitute a serious deterrent to the continued vitality of this form of commerce.

This Court has recognized in the area of sovereign immunity that governments may not categorically immunize themselves from claims arising out of commercial transactions. *National City Bank* v. *Republic of China*, 348 U.S. 356 (1955). Yet if counsel for a government entity can merely state that his party will not pay and thereby avoid liability, sovereign immunity will have been reestablished on a different but far broader foundation. A holding which permits firm contractual obligations to be abrogated by after-the-fact denials by trial counsel will constitute a significant deterrent to the continued making of such commitments.

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Consents to Filing

Pursuant to Rule 42(2) of this Court we hereby consent to the filing by the Bank of Boston International of this brief as *amicus curiae.*

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